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SENATE

REPORT
101-352

AUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF ENVIRONMENTAL QUALITY

JUNE 28 (legislative day, JUNE 11), 1990.—Ordered to be printed

Mr. BURDICK, from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 1089]

The Committee on Environment and Public Works, to which was referred the bill (S. 1089), to authorize appropriations for the Office of Environmental Quality for fiscal years 1989, 1990, 1991, and 1992, and for other purposes, having considered the same, reports favorably thereon with amendments and an amendment to the title and recommends that the bill as amended do pass.

GENERAL STATEMENT

As amended, S. 1089 extends authority for appropriations for the Office of Environmental Quality through fiscal year 1992. In addition, the bill responds to recent litigation concerning the requirements of a minimally acceptable environmental impact statement (EIS); requires submission of a new, policy-oriented annual report to Congress; establishes a process to monitor implementation of mitigation measures identified in EISs; includes several provisions to clarify the scope of the National Environmental Policy Act (NEPA), including the applicability of the law to extraterritorial actions; provides explicit statutory authority for the Council on Environmental Quality (CEQ) to promulgate binding regulations, a function CEQ currently exercises under the authority of an Executive Order; and modifies the structure of CEQ by eliminating two of the three Council positions.

This last amendment was requested by the Administration and is designed to enable the Chairman of CEQ to fulfill the roles mandated under NEPA, Including the role of environmental advisor to

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the President, unencumbered by the formal consultative process with other Council Members that is presently required.

PURPOSE AND BACKGROUND

January 1, 1990, marked the 20th year since NEPA was signed into law. Since enactment, the law has served as a model for 27 State statutes and the principles of environmental assessment set forth in NEPA have been adopted by countries throughout the world.

Twenty years of experience has taught us the value of NEPA and of the EIS process. In recent years, several issues have arisen that require Congressional attention and legislative responses.

NEED FOR STATUS QUO

NEPA is one of the most important and far-reaching environmental statutes ever enacted. It establishes both important substantive goals and strict procedural requirements.

In enacting NEPA, Congress recognized and declared a continuing policy to use all practical means and measures to create and maintain conditions under which man and nature can exist in productive harmony. To this end, Congress has made it the continuing responsibility of the Federal Government to fulfill its responsibilities as trustee of the environment; to assure safe, healthful, productive surroundings; to attain the widest range of beneficial uses of the environment; to maintain an environment which supports diversity and variety of individual choice; to achieve a balance between population and resource use; and to enhance the quality of our renewable resources.

These substantive environmental requirements are strengthened by the statute's strict procedural command that federal agencies—"to the fullest extent possible"—consider environmental impacts throughout their planning and decisionmaking process. This command requires agencies to maintain the status quo pending compliance, and failing that, for the courts to do so.

By this dual mandate Congress has sought to preserve both the quality of the human environment and the integrity of the NEPA review process. While NEPA's substantive requirement seek to prevent immediate harm to our physical resources, NEPA's procedural commands are designed to eliminate the long-term injury that inevitably occurs through the failure to take environmental factors into account in the decision-making process. Enforcement of NEPA's substantive environmental requirements thus calls for a balancing of equitable factors. NEPA's procedural obligations, on the other hand, are absolute; Congress has already done the balancing and concluded that failure to comply with NEPA's environmental review provisions results in irreparable injury. To ensure that the decisionmaking process has meaning, NEPA's procedural commands inescapably includes the requirement that Federal agencies maintain the status quo pending compliance with the strict procedural commands of the statute. Late compliance is of little or no value, for it does no good to close the barn door after the horses are gone.

Without the status quo requirement, the integrity of NEPA would be violated and irreparable harm the statute is designed to prevent would occur. Therefore, while the courts retain their authority to engage in a balancing test in determining appropriate relief when compliance with NEPA's substantive requirements are at issue, Congress has eliminated the need for further balancing where the procedural commands have been violated and the harm is to the decisionmaking process itself. Only an injunction can vindicate these objectives in NEPA.

Mitigation of Adverse Environmental Effects.

In May 1989, the U.S. Supreme Court ruled that "NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan". The ruling was issued as part of the decision in *Robertson* v. *Methow Valley,* 57 U.S.L.W. 4497 (May 1, 1989), reversing a 9th Circuit Court of Appeals decision.

This narrow interpretation of NEPA's substantive duties and procedural requirements is contrary to the overall objectives of the Act. Therefore, as part of a legislative response to the decision, it is necessary to state explicitly in the statute at least some of the factors that must be considered by an agency to comply with the procedural requirements of the Act.

The amendments included in this bill clarify the scope of alternatives that must be considered by Federal agencies and will require Federal agencies to include in EISs (1) a statement of the measures that will be taken to mitigage adverse environmental effects if the proposed action is implemented; (2) a discussion of the basis for selecting the particular mitigation measures; and (3) a description of how the proposed action, selected alternative and mitigation measures conform to the policies and substantive requirements of NEPA.

The Legislation reaffirms the basic principle the Congress intended NEPA to be construed broadly. Federal agencies have a responsibility under NEPA to take an expansive, rather than a narrow view of proposed projects and attendant impacts.

Regulatory Authority and Applicability

Section 204 of NEPA is amended by section 4 of S. 1089 to provide a statutory basis for CEQ regulations. CEQ presently issues regulations under authority provided by an Executive Order (E.O. 11514, as amended by E.O. 11991). Although most Federal agencies, including independent regulatory commissions, have recognized their legal obligation to comply with CEQ regulations, CEQ's authority to issue binding regulations has not gone unchallenged.

This amendment clarifies the law by explicitly reaffirming in the statute CEQ's authority to issue regulations that must be followed by all Federal agencies. CEQ is also directed to revise such regulations to reflect the legal responsibility of all Federal agencies to consider global environmental impacts when reviewing the environmental impacts of major Federal actions.

Global climate change, stratospheric ozone depletion, transboundary pollution, tropical deforestation, loss of biological diversity, de-

sertification, and population growth are examples of international environmental problems that demand greater attention than they have received in the past. Although NEPA currently requires agencies to consider local, regional and global environmental impacts, the record of compliance with this requirement of the law is disturbingly weak.

By letter dated September 12, 1986, severl Members of the Senate wrote to A. Alan Hill, then-Chairman of CEQ, regarding two of these global environmental problems, climate change due to an intensification of the greenhouse effect and stratospheric ozone depletion due to emissions of industrial and other trace gases. That letter correctly noted that CEQ is charged with overseeing the government's implementation of NEPA and urged the Chairman to provide guidance to Federal agencies concerning their responsibilities to address these issues. It was stated that "CEQ should inform Federal agencies of their legal obligation to address these issues" under NEPA. By letter dated February 24, 1989, the Ranking Minority Member of this Committee received from Mr. Hill a draft copy of guidance being prepared by CEQ as a partial response to the recommendations set forth in the letter dated September 12, 1986. (The letters are printed below. The draft guidance was made part of of the hearing record, at the request of Subcomittee Chairman Lautenberg, from the hearing before the Subcomittee on Superfund, Ocean and Water Protection, June 1, 1989, S.Hrg. 101-132, p. 108-125).

Unfortunately, the draft document has yet to be completed or formally issued. In addition, the draft document does not cover all global impacts. It is limited to the issue of global climate change. For these reasons, an amendment is included in this bill directing CEQ to promulgate regulations to assure that the requirements of the law regarding consideration of all global impacts are complied with by all Federal agencies in the course of assessing proposed Federal actions, including the cumulative impact of such actions.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, DC, February 24, 1989.

Hon. JOHN H. CHAFEE,
Ranking Minority Member, Committee on Environment and Public Works, Washington, DC.

DEAR SENATOR CHAFEE: This letter is in response to your letter of January 11, 1989 to the President. Your letter referred to guidance being prepared by the Council for use by federal agencies in the preparation of environmental impact assessment documents. I am pleased to enclose a copy of the draft as prepared by the Council.

It has not been sent out for interagency review and comment but will be in the near future. Following that, the final guidance document will be issued to federal agencies.

Please know that your concern is shared and that this matter is viewed seriously by all of us in the Administrator.

Sincerely,

A. ALAN HILL,
Chairman.

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC, January 11, 1989.

Hon. GEORGE BUSH,
Vice President, The White House, Washington, DC.

DEAR MR. VICE PRESIDENT: It is with dismay that we have learned of the decision by the Reagan Administration to prevent implementation of the recommendation by the Council on Environmental Quality that the Greenhouse Effect be employed as a criteria in the issurance of Environmental Impact Statements.

We believe that this is a mistaken, and potentially harmful policy decision, and urge you to reverse this decision early in your Administration.

As you know, the Committee on Environment and Public Works has long been concerned about the impact of the Greenhouse Effect. There exists irrefutable scientific evidence as to the ecologically-damaging nature of the Greenhouse Effect and to the serious threat of increased world temperatures. Indeed, last week, the National Academy of Sciences declared "that global environmental change may well be the most pressing international issue of the next century."

It is vital that the United States lead the effort to address with this monumental problem, and the federal government must take the initiative to do so. It was for that reason that in September 1986 several Committee Members called on the Chairman of the CEQ to change its policy regarding the Greenhouse Effect and global warming, directing that "government agencies should immediately begin consideration of these issues in the environmental impact statement process mandated by the National Environmental Policy Act. Since CEQ is charged with overseeing the government's implementation of NEPA, your Council ought to provide guidance to federal agencies concerning their responsibilities to address these issues."

It is our understanding that the CEQ was prepared to require consideration of the Greenhouse Effect this month. The White House, however, has now blocked that requirement.

This policy change represents a major step backward, and leaves an extremely unfortunate environmental legacy for the Reagan Administration. Ideally, we hope that the tremendously harmful effect of this decision will be recognized and the decision will be reversed in the current Administration's waning days.

More importantly, however, it is imperative that the Bush Administration—from its first days in office—give the matter of global warming the highest priority, and require that climate change effects be considered in the issuance of Environmental Impact Statements. This can and should be done expeditiously. There is little need for another legnthy bureaucratic delay merely because of a change in Administration.

The United States should be providing leadership around the world in combating global warming. The decision by the White House sends precisely the wrong message. It flies in the face of all that we know about global warming, its causes, and its ominous impact.

We urge you to reconsider this ill-thought policy, and to make an important statement about the concern of the United States for global warming by reversing this policy early in your Administration.

Sincerely,

JOHN H. CHAFEE,
Ranking Minority Member.
DAVE DURENBERGER.
QUENTIN N. BURDICK,
Chairman.
GEORGE J. MITCHELL.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, DC, March 3, 1987.

Hon. JOHN H. CHAFEE,
Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR SENATOR CHAFEE: This is in response to your letter of last fall concerning consideration of ozone depleting and climate change due to the greenhouse effect within the framework of the National Environmental Policy Act (NEPA) and the CEQ regulations implementing the procedural provision of NEPA. First, let me apologize for the delay in acknowledging your letter. The issues which were raised in the letter are of concern to all of us who deal with environmental matters. The delay in responding to you was, in fact, due largely to consideration of these matters in the context of discussions within the Administration. Those discussions have not been completed.

The issues of climate change due to the greenhouse effect and ozone depletion due to emissions of industrial and other trace gases involve difficult and unresolved scientific questions. As you may know, the Council recently issued an amended regulation which requires agencies to address incomplete or unavailable information in an environmental impact statement. Among other things, it requires agencies to evaluate reasonably foreseeable impacts of their proposed actions, based upon theoretical approaches or research methods generally accepted in the scientific community. This includes an evaluation of impacts which have catastrophic consequences, even if their probability of occurrence is low, if the analysis of impacts is supported by credible scientific evidence. 40 C.F.R. 1502.22, as amended, 51 FR 15625 April 15, 1986).

In a recent informal survey by CEQ, we identified three environmental impact statements (EISs) which discussed the impacts of climate change due to the greenhouse effect and ozone depletion. Those EIS(s) are the Federal Aviation Administration's EIS on the Applications of Air France and British Airways to Operate the Concorde in the United States (1975); the Food and Drug Administration's EIS on their regulatory action to limit use of chlorofluorocarbons (CFCs) as propellants in aerosols (1977); and an EIS prepared by the National Aeronautics and Space Administration on the Space Shuttle Program (1978).

As a result of this survey, I have decided that the Council should examine your suggestion more closely. To that end, the Council will be holding a Sunshine Act meeting to discuss this important issue with represenatives of Federal Agencies. I will, of course, keep you advised of the Council's activities. Miss Dinah Bear, CEQ General Counsel (395–5754), will be the contact person for members of your staff should you have any questions.

Again, I want to extend my apology for a tardy reply to your letter.

Sincerely,

A. ALAN HILL,
Chairman.

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC, September 12, 1986.

A. ALAN HILL,
Chairman, Executive Office of the President, Council on Environmental Quality, Washington, DC.

DEAR MR. CHAIRMAN: We are writing to request action by the Council on Environmental Quality (CEQ) to improve the government's responsiveness to two environmental problems of increasing international concern: climate change due to the greenhouse effect; and stratospheric ozone depletion due to emissions of industrial and other trace gases. We believe that government agencies should immediately begin consideration of these issues in the environmental impact statement (EIS) process mandated by the National Environmental Policy Act. Since CEQ is charged with overseeing the government's implementation of NEPA, your Council ought to provide guidance to Federal agencies concerning their responsibilities to address these issues.

The Subcommittee on Environmental Pollution reviewed the status of these environmental problems during two days of hearings on June 10 and 11, 1986. The witnesses, including leading scientists and representatives of the Environmental Protection Agency, the National Aeronautics and Space Administration, and the Departments of Commerce, State, and Energy all agreed that the problems are serious. According to the experts, the initial impact of these problems could be felt within the next decade and very serious changes may occur shortly after that. The hearings confirmed the fact that government agencies are not adequately assessing federal actions and policies that may be aggravating the problems of climate change due to the greenhouse effect and stratospheric ozone depletion.

The NEPA process provides a valuable mechanism to promote understanding and an opportunity for advance planning to prevent or mitigate these environmental problems. CEQ should inform Federal agencies of their legal obligation to address these issues. The Council should also provide general background, as well as references to further sources of information, much as it has done in the past with respect to critical farmlands and river protection.

We look forward to receiving your prompt reply to this urgent matter and working with you on these and other important environmental issues.

Sincerely,

GEORGE MITCHELL.
ALBERT GORE, Jr.
MAX BAUCUS.
PATRICK J. LEAHY.
JOHN H. CHAFEE.
ROBERT T. STAFFORD.
DAVE DURENBERGER.
GORDON J. HUMPHREY.

REPORTS TO CONGRESS

One of CEQ's responsibilities under NEPA is to prepare an annual report to Congress, on behalf of the President, documenting the status of the environment. CEQ is particularly well suited to carry out this task, which requires assembling, cataloging and assimilating data from agencies and departments throughout the Federal Government. It also requires description of environmental issues in a broad context, and interpretation of environmental trends and conditions. The document provides a readily accessible and convenient reference to readers at all levels of government and has proven to be popular with the public.

The legislation retains this annual reporting requirement and establishes a second annual reporting requirement. This new report is to be policy oriented, detailing the President's plans for environmental initiatives during the coming year, including new initiatives and programs to improve existing environmental programs.

RESTRUCTURING OF CEQ

Section 3 of S. 1089 restructures the present CEQ format under NEPA as set forth in proposed legislation that was sent to Congress by the Administration on April 12, 1990. It abolishes two of the three Council member positions, leaving one person selected by the President and confirmed by the Senate to serve as the sole member and Chairman of CEQ.

This amendment also reflects the recommendations of the "Blueprint for the Environment" developed by environmental groups and submitted to the President in 1989. Michael McCloskey, Chairman of the Sierra Club, testified before the Subcommittee on Superfund, Ocean, and Water Protection on June 1, 1989, and noted:

> When the Council was established, it was modeled on the Council of Economic Advisers, and three Council members were specified. But in reality, the extra two Council members—besides the Chairman—have never had a very clear or useful role. It is the Chairman, not the other two members, who relates to the President and the White House . . . Thus, we think it is time to dispense with the confusion and unnecessary expense of the other two Council members.

The term "Council" is an obvious anomaly when applied to an organization consisting of one person. Nevertheless, to avoid the confusion that might result if an alternative term were chosen, no changes are proposed to the title "Council on Environmental Quality". The functions assigned to CEQ under NEPA are unchanged and the title provides an historical frame of reference.

Environmental Impact Statement Review

Section 5 of S. 1089 provides for systematic monitoring and appraisal of the EIS process. Currently, there is no uniform procedure for evaluating implementation of, for example, mitigation measures identified in EISs. The amendment directs CEQ to issue guidelines to be followed by all Federal agencies and requires each agency to review the degree to which mitigation measures included in a representative sampling of EISs are implemented and the effectiveness of such implementation.

OEQ Reauthorization

In 1970, the Environmental Quality Improvement Act (EQIA) was enacted as companion legislation to NEPA. It established the Office of Environmental Quality (OEQ) to provide staff support to CEQ. In addition to the authorization for appropriations under EQIA, there is a standing authorization for appropriation of $1,000,000 annually under NEPA to support CEQ and implementation of NEPA. The authorizations for OEQ and EQIA, however, lapsed at the end of fiscal year 1985.

An amendment to EQIA authorizes $1,000,000 for each of fiscal years 1989 and 1990. For each of fiscal years 1991 and 1992, $3,000,000 is authorized.

After several years of neglect and diminished responsibilities, CEQ is undergoing a period of expansion to accommodate the expanded role it has been assigned in the current Administration. This expansion is warranted given the growing complexity of environmental issues and the need for CEQ to develop and maintain expertise to meet the mandates of NEPA.

While many agencies may not routinely undertake "major Federal actions significantly affecting the environment", they are still bound by policies set forth in NEPA. It is CEQ's responsibility to oversee Federal activities to assure that the intent and letter of the law are being followed. This function is unique to CEQ and does not overlap with other Federal departments, agencies, or commissions. Increased staff and resources will enable the Council to be responsive to agency concerns and to implement fully the requirements of NEPA and S. 1089.

Extraterritorial Applications of NEPA

For the most part, Federal agencies have managed successfully to incorporate the requirements of NEPA into the decision-making processes that precede domestic projects and activities. The record with respect to domestic Federal actions that have environmental impacts on the global commons, as well as Federal actions proposed to be undertaken beyond the borders of the United States, how-

ever, is disturbingly weak and reveals a basic misunderstanding about the nature and purpose of NEPA.

The law makes no distinction between Federal actions with domestic implications only and those with extraterritorial implications. To clarify this point, S. 1089 includes an amendment to NEPA to state explicitly that NEPA applies to "extraterritorial" Federal actions. The Act is further amended to emphasize the responsibility of all U.S. departments and agencies to adopt a global perspective in implementing the goals and procedures set forth in NEPA.

Section 102 of NEPA provides that the requirements of the law apply to ". . . major Federal actions significantly affecting the quality of the human environment . . .". No distinction is made as to whether those actions or the impacts of those actions occur within or outside the boundaires of the United States. A review of NEPA's legislative history an the implementing documents initially issued by CEQ reveals the intent of Congress in enacting NEPA to require consideration of the local, regional, and global environmental impacts of proposed Federal actions without regard to the territorial borders of the United States.

Senator Jackson, Chairman of the Interior and Insular Affairs Committee which reported the NEPA legislation (S. 1075, 91st Cong.) made the following statement during Senate debate on July 10, 1969:

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence of mankind. That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on Earth. (July 10, 1969, Cong. Rec., p. 19009)

In a "Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions" dated September 24, 1976, and sent to all Federal agencies, CEQ Chairman Russell Peterson, stated:

> * * * The Act contains no express or implied geographic limitation of environmental impacts to the United States or to any other area. Indeed, such a limitation would be inconsistent with the plain language of NEPA, its legislative purpose, the Council's Guidelines, and judicial precedents. . . . In summary, the Council believes that the impact statement requirement in Sec. 102(2)(C) of NEPA applies to all significant effects of proposed Federal actions on the quality of the human environment—in the United States, in other countries, and in areas outside the jurisdiction of any country.

Administrator John Gilligan of the Agency for International Development (A.I.D.) wrote to Charles Warren, Chairman of CEQ, December 9, 1977 with observations about implementing EIS requirements and described A.I.D.'s experience as positive, observing that:

> * * * the practical experience of A.I.D. has been that it is possible to undertake detailed environmental analyses of

> U.S.-supported projects abroad and the results obtained are useful to us, as well as to host country planners, in making project decisions.

Notably, Mr. Gilligan stated further that, "Achievement of the Agency's mandate has not been impaired by the conduct of environmental analyses."

The extraterritorial scope of NEPA has been reviewed in hearings on many occasions by this Committee. In 1978, the Subcommittee on Resources Protection conducted two days of hearings on proposed Export-Import Bank Act Amendments (S. 3077, 95th Congress) which would have explicitly waived application of NEPA to Bank actions beyond U.S. borders. On July 11, 1978, Herbert J. Hansell, legal adviser from the Department of State testified before the Subcommittee, accompanied by CEQ Chairman, Charles Warren, and Export-Import Bank Chairman, John Moore. Senator Muskie, Chairman of the Subcommittee on Environmental Pollution made the following statements with respect to extrateritorial application of NEPA:

> * * * The environment is indivisible, as far as I am concerned, and the thought never occurred to me that somewhere down the line 9 years later the argument would be made that because major Federal actions impacting on areas outside the United States were not specifically referenced that, therefore, they were excluded. I don't need a court to decide that question for me. I have no doubt about it.
>
> * * * In my view, the intention of the National Environmental Policy Act and the environmental impact statement was to apply to major Federal actions wherever they impact within the United States or outside. I just want to make that statement very clear * * * [Hearings before the Subcommittee on Resource Protection of the Committee on Environment and Public Works, June 20 and July 11, 1978, Serial No. 95–H67, p. 220]

Congressman John Dingell, an active participant in NEPA's passage, contributed a statement to the same hearing and stated the following:

> The legislative history of the NEPA and subsequent judicial interpretations clearly indicate that the law must apply to all major federal undertakings which might result in serious environmental damage, whether this impact occurs within this country or beyond our borders * * * [Hearings before the Subcommittee on Resource Protection of the Committee on Environment and Public Works, June 20 and July 11, 1978, Serial No. 95–H67, p. 254]

In the course of these hearings there was considerable dialogue demonstrating that, despite the legislative history and initial interpretation of the law by CEQ, there was an ongoing debate within the Administration about the extraterritorial application of NEPA. It was also noted that, rather than seek a judicial resolution of the issue or legislative changes to eliminate the requirement to apply NEPA to extraterritorial actions, the Administration was attempt-

ing to resolve the dispute administratively by drafting and issuing an Executive Order. Charles Warren, then-Chairman of CEQ, stated in the course of his testimony that "NEPA is the legal base for the issuance of the Executive Order" that was being drafted.

In 1979, Executive Order 12114 was issued by President Carter. The Executive Order, however, was based on "independent authority", not NEPA, and therefore failed to address the questions that had been raised by some agencies concerning extraterritorial application of NEPA. Further, the Executive Order is not enforceable and lacks many important features of NEPA and the implementing regulations, including provisions for public participation.

In 1987, CEQ surveyed Federal agencies on implementation of Executive Order 12114 and found that agency interpretations of the Order were inconsistent and that many were confused about its application. The evidence suggests that many agencies engaged in extraterritorial activities and domestic activities with extraterritorial environmental impacts are not adequately implementing or complying with either NEPA or Executive Order 12114.

Testimony presented to the Subcommittee on Superfund, Ocean, and Water Protection on June 1, 1989, by Nicholas A. Robinson, a member of the 1970–1972 Legal Advisory Committee on CEQ, and professor at the Center for Environmental Legal Studies, Pace University School of Law, noted an example of the benefits that can be derived from preparing an EIS for extraterritorial activities. He made the following observations:

> * * * Panama is crucial to U.S. foreign policy for its strategic canal; but the area also is crucial in preventing *aftosa* (hoof and mouth disease) from spreading out of Latin America to Central and North America. NEPA litigation had required the Federal Highway Administration to consider these impacts before constructing missing links in the Pan American Highway. Sensitized to these concerns, the Panama Canal Treaties made provision for a Joint Commission, U.S.-Panama, to cope with sanitary and environmental protection issues. The Department of State complied with NEPA and prepared a full EIS on the draft Panama Canal Treaties before they underwent Senate ratification. The (Acting) Secretary of State, Warren Christopher, acknowledged the valuable guidance NEPA provided * * * [Hearing before the Subcommittee on Superfund, Ocean And Water Protection of the Committee on Environment and Public Works, June 1, 1989, S. Hrg. 101–132, p. 56]

It is disturbing to note that, despite the clear, unambiguous language of the statute, there is still some confusion about the extraterritorial reach of NEPA. Resolution of this matter is long overdue and the history of previous attempts to address it administratively demonstrates the need for legislative clarification.

CEQ has initiated a series of meetings with Federal agencies, through an interagency task force, to evaluate implementation of Executive Order 12114 and to consider environmental assessment procedures with respect to extraterritorial environmental impacts of Federal actions. It is anticipated that the work of the task force

will facilitate compliance with NEPA with respect to extraterritorial actions as well as domestic actions with extraterritorial impacts. The task force could also help the agencies identify which agency-specific NEPA procedures that have been developed for application to domestic actions may need to be modified for application to extraterritorial actions.

The ongoing effort by the Administration to review and possibly to revise Executive Order 12114 should continue. It is unlikely, however, to obviate the need for legislative clarification.

Therefore, section 1 of S. 1089 provides the necessary legislative clarification by amending section 102(2)(C) of NEPA to refer explicitly to extraterritorial actions. Although the rules and procedures that have been developed in the course of applying NEPA to domestic actions may have to be modified slightly when applying NEPA to extraterritorial actions, Federal agencies now have 20 years of experience in implementing NEPA and are well acquainted with the requirements of the law. Nevertheless, to assist all Federal agencies, CEQ should expeditiously issue guidance or amend regulations to assure that appropriate and conforming procedures are adopted to implement this requirement of the law.

Clarifications

Some Federal agencies and representatives from the Federally regulated community and private sector have raised several concerns about implemention and application of the Act to extraterritorial actions. These concerns are addressed in the following sections of this report. The concerns generally fall into three categories:

First, concerns about potential conflicts between NEPA compliance and activities undertaken in the interest of national security or implementation of foreign policy, particularly with respect to the delivery of emergency aid or the rendering of time sensitive decisions;

Second, concerns about new, overly-broad interpretations of the phrase "major Federal actions" under NEPA; and

Third, concerns about excessive litigation, including a proliferation of lawsuits filed by foreign nationals.

National Security and Foreign Policy Concerns

Section 101 of NEPA sets forth the substantive requirements, goals and policies of the Act and states that it is the responsibility of the Federal Government to "use all practicable means, consistent with other essential considerations of national policy" to pursue the objectives of NEPA. Section 102 requires that agencies comply "to the fullest extent possible" with the procedural requirements of the Act. CEQ regulations define this to mean that agencies shall comply "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible" (40 CFR 1500.6). Section 105 of NEPA specifically states that the policies and goals of the Act are supplementary to those in existing authorizations of Federal agencies, further defined by the regulations to mean that NEPA applies "except where compliance would be inconsistent with other statutory requirements" (40 CFR 1500.3).

This bill does not modify any of these provisions. These provisions were included in the law to assure that there would not be a direct conflict between the mandated activities of the Federal agencies, or measures deemed to be essential to national policy, and the implementation of NEPA. To supplement and reinforce these provisions of the law, S. 1089 includes an explicit exemption from the requirements of section 102(2)(C) for five categories of extraterritorial actions. The excluded actions are:

—those taken to protect the national security of the U.S.;
—those taken in the course of an armed conflict;
—strategic intelligence activities;
—armaments transfers; and
—judicial or administrative civil or criminal enforcement actions.

Current CEQ regulations provide for case-by-case exemptions from the EIS requirements of section 102(2)(C) to accommodate circumstances in which an emergency precludes compliance (40 CFR 1506.11). In a hearing before the Superfund, Ocean, and Water Protection Subcommittee on June 1, 1989, CEQ Chairman A. Alan Hill described the authority of CEQ to provide emergency waivers from NEPA procedures.

As with the current application of NEPA to domestic activities, NEPA should be applied to extraterritorial activities in a manner that does not impede disaster or emergency relief activities. In general, many of these activities would probably not fall within the scope of NEPA. CEQ should, however, review the situation to determine whether modifications or clarifications in its regulations are needed to adapt to foreign relief activities. Similarly, CEQ should review its regulations to clarify, for example, that "statutory requirements" covered by section 105 include international legal obligations. Nothing in this amendment is intended to undermine the ability of the U.S. to fulfill its international legal obligations.

Similarly, NEPA's relationship with other Federal statutes is not changed because of its application to the Federal agency actions specifically listed in section 204, as amended by section 4 of S. 1089. Each agency of the Federal Government is required to comply with section 102(2)(C) of NEPA "to the fullest extent possible," as discussed previously. For instance, if an agency is charged with representing the U.S. by casting timely votes in international organizations, section 204, as amended, does not change the nature of section 102(2)(C) in a manner that would prevent the agency from casting a vote in a timely manner.

"Major Federal Actions"

It is important to emphasize that, aside from including extraterritorial actions and impacts, the meaning of the phrase "major Federal action" under NEPA is not expanded or otherwise modified by S. 1089. It is expected that in the course of determining whether a proposed Federal action is "major" for purposes of NEPA, similar if not identical criteria will be used to assess extraterritorial Federal actions as are used to assess domestic Federal actions. The amendment to clarify the applicability of the law to extraterritorial actions should not be interpreted or applied to alter the meaning of "major."

As noted previously, agencies may adopt NEPA procedures for extraterritorial activities that vary from those they follow with respect to domestic actions, provided they conform to the requirements set forth in the statute and CEQ regulations. As is the case now with domestic actions, extraterritorial actions which have no Federal involvement are not subject to NEPA environmental review.

Litigation

There is nothing in the record or the history of NEPA to suggest that clarification of the "extraterritorial" reach of NEPA will result in an unmanageable explosion of litigation, including suits brought by foreign plaintiffs in U.S. courts. There has been ample opportunity for the filing of suits challenging the legality of extraterritorial actions since the enactment of NEPA 20 years ago and the actual number of cases filed and litigated has been relatively small.

This issue was addressed in 1978, during the Subcommittee on Resource Protection's hearing on the Export-Import Bank Act Amendments by Russell Train, the first CEQ Chairman, who testified in his capacity as President of the World Wildlife Fund. The following exchange took place between Senator Hodges and Mr. Train:

> Senator HODGES. Do you believe the Eximbank NEPA procedures should insulate institutions from lawsuits and money from the loss of a sale to the foreign competitor?
>
> Mr. TRAIN. * * * I think that if the process is properly undertaken in the first instance and that there is real effort made to identify environmental impacts and alternatives, and then the fact is that Eximbank proceed with the particular loan, there really is no legitimate basis in most cases for litigation. Because as I indicated, the NEPA does not involve a mandate in support of the kind of action taken, but it does require a responsible compliance with NEPA.

As long as that is done, I don't see that that would involve any unnecessary litigation. [Hearings before the Subcommittee on Resource Protection of the Committee on Environment and Public Works, June 20 and July 11, 1978, Serial No. 95–H67, p. 8]

Professor Robinson also addressed this issue in his testimony before the Superfund, Ocean, and Water Protection Subcommittee on June 1, 1989. He stated:

> * * * there are those who say, if we allow extraterritoriality, there will be a floodgate of litigation. Well, first, that simply has not happened under NEPA. Second, it has not happened under the formula of the Freedom of Information Act which is in place. Third, I think if you ask any bar association in this country to respond to the question of would that result in excessive litigation that would tie up the country, the bar associations will say no. [Hearing before the Subcommittee on Superfund, Ocean And Water

Protection of the Committee on Environment and Public Works, June 1, 1989, S. Hrg. 101-132, p. 9]

SECTION-BY-SECTION ANALYSIS

SECTION 1. CLARIFICATION OF NATIONAL ENVIRONMENTAL POLICY

Section 1(a) amends section 101(b) of NEPA to add a seventh objective to the present list of six objectives: to "provide world leadership in ensuring a healthy and stable global environment".

Section 1(b) amends section 102(2)(C) of NEPA in several respects. First, the law is amended to clarify that the legal requirement to assess the environmental impacts of major Federal actions applies to all major Federal actions "including extraterritorial action." Except as outlined in the Purpose and Background portion of this report regarding emergency situations and instances of conflicting legal obligations, the only exceptions to this requirement are actions taken to protect the national security of the U.S., those taken in the course of an armed conflict, strategic intelligence activities, armaments transfers, and judicial or administrative civil or criminal enforcement actions.

Second, NEPA is amended to refine the present language regarding the requirement to examine alternatives to proposed actions in environmental impact statements. The amendment clarifies the scope of alternatives that must be considered. Specifically, alternatives which would achieve the same or similar purpose of the proposed action, including those that would mitigate adverse environmental effects must be considered.

Third, NEPA is amended to require that EISs include a discussion of the mitigation measures that will be taken if the proposed action is implemented, including a discussion of the rationale for selecting those measures and a discussion of how the mitigation measures selected conform to the policies and substantive requirements of the Act.

Fourth, the Act is amended to add to the current requirement for interagency consultation, a requirement that Federal agencies consult with the public early in the preparation of an EIS.

Section 1(c) reaffirms and strengthens section 101(2)(F) of NEPA which sets forth the obligation of Federal agencies to promote protection and enhancement of the global environment.

SECTION 2. PRESIDENT'S STRATEGY FOR ENVIRONMENTAL PROGRESS

Section 2 adds a requirement for a new, annual environmental strategy report to Congress. The amendment requires the President to submit an annual report to Congress to (1) set forth the strategy that will be followed by the Administration in the following year to implement the policies and substantive requirements of NEPA, including those set forth in section 101 of the Act; (2) identify new and emerging environmental issues; (3) describe initiatives that will be undertaken in the following year to strengthen environmental programs; (4) recommend national and international environmental priorities; (5) evaluate the effectiveness of mitigation measures specified in EISs; and (6) summarize EIS implementation during the previous year.

SECTION 3. ELIMINATION OF COUNCIL MEMBER POSITIONS

Section 3 restructures the format of CEQ under section 202 of NEPA by abolishing two of the three Council member positions.

SECTION 4. REGULATORY AUTHORITY AND APPLICABILITY

Section 4 amends section 204 of NEPA to provide an explicit statutory basis for regulations issued by CEQ and to clarify that such regulations are applicable to all Federal agencies and independent regulatory commissions. The amendment also directs CEQ to revise its regulations to foster compliance with the statutory requirement for full consideration of all local, regional, and global environmental impacts of proposed major Federal actions, including the cumulative impacts of such actions.

This amendment does not require that CEQ repromulgate existing regulations. CEQ should, however, reassess its regulations in light of the amendments contained in S. 1089 and must revise its regulations to assure that, as part of the NEPA process, agencies are complying with the requirement to consider extraterritorial impacts, including cumulative environmental impacts on the global commons.

SECTION 5. REVIEW FUNCTIONS OF THE COUNCIL

Section 5 is a freestanding, new provision of law. It requires CEQ to issue, within 6 months of enactment, guidelines to be followed by each Federal agency in the course of implementing the new requirement to review a representative sample of the EISs they have prepared that include specific mitigation measures. The review of EISs must consider (1) the accuracy of predicted adverse environmental effects, (2) the extent to which specified mitigation measures were implemented, and (3) the effectiveness of those measures. A summary of the results of these reviews are to be included in the Council's annual report under new section 201(b).

The guidelines shall specify the timing and frequency of agency reviews, and shall require Federal agencies to assess EIS's for (1) implementation of mitigation measures; (2) the accuracy of the predicted environmental effects; and (3) the effectiveness of the mitigation measures.

SECTION 6. AUTHORIZATION OF APPROPRIATIONS

Section 6 amends the Environmental Quality Improvement Act to extend authorizations for the Office of Environmental Quality through fiscal year 1992. For fiscal years 1989 and 1990, $1 million is authorized to be appropriated annually. The annual authorization increases to $3 million for fiscal years 1991 and 1992.

HEARINGS

The Subcommittee on Superfund, Oceans, and Water Protection conducted one day of hearings on S. 1089 and related legislation. The Subcommittee met on June 1, 1989, and received testimony from the Council on Environmental Quality, the Environmental Protection Agency, the Department of State, the Department of

Treasury, the Sierra Club, and a representative from Pace University School of Law.

MARKUPS

The Subcommittee on Superfund, Oceans, and Water Protection met to consider S. 1089 on August 1, 1989. One amendment was adopted by voice vote to the bill as introduced, offered by Senators Lautenberg and Durenberger. The bill, as amended, was recommended to the full Committee by voice vote.

The full Committee considered S. 1089 on April 24, 1990. Three amendments were adopoted by voice vote, offered by Senators Burdick and Chafee. The bill, as amended, was voted reported by voice vote.

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during consideration of this bill be announced in this report. No rollcall votes were taken during consideration of this bill.

REGULATORY IMPACT

Section 11(b) of rule XXVI of the Standing Rules of the Senate requires the Committee to evaluate the regulatory impact of the reported bill.

Regulatory changes made by this bill are clarifications of authorities available under existing law. It is not anticipated that this bill will impose a significant new regulatory burden.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires each report to contain a statement of the cost of the reported bill prepared by the Congressional Budget Office. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 2, 1990.

Hon. QUENTIN N. BURDICK,
Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 1089, a bill to authorize appropriations for the Office of Environmental Quality for fiscal years 1989, 1990, 1991, and 1992, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1089.

2. Bill title: A bill to authorize appropriations for the Office of Environmental Quality for fiscal years 1989, 1990, 1991, and 1992, and for other purposes.

3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works, April 24, 1990.

4. Bill purpose: S. 1089 would authorize the appropriation of $3 million for the Office of Environmental Quality for each of the fiscal years 1991 and 1992. The 1990 budget authority for the Council on Environmental Quality (CEQ) and Office of Environmental Quality is currently $1.5 million, and the President has requested $2.8 million for 1991.

Other provisions of the bill would change certain reporting requirements, and provide the CEQ statutory authority to issue regulations and guidelines.

5. Estimated cost to the Federal Government:

[In millions of dollars]

	Fiscal year—				
	1991	1992	1993	1994	1995
Authorization level	3.0	3.0			
Estimated outlays	2.7	3.0	0.3		

The costs of this bill fall within budget function 800.

Including outlays for prior years' appropriations to date, total outlays for the Office of Environmental Quality in 1991 would be about $2.8 million.

Basis of estimate: This estimate assumes the amounts authorized will be appropriated. The estimate of outlays is based on historical spending patterns for this account. Other provisions of S. 1089 would not affect the budget.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None

9. Estimate prepared by: James Hearn (226–2860).

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

THE NATIONAL ENVIRONMENTAL POLICY ACT

* * * * * * *

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I—DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) * * *

* * * * * * *

(b)(1) * * *

* * * * * * *

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; [and]

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources; *and*

(7) provide world leadership in ensuring a healthy and stable global environment.

* * * * * * *

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance wth the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) * * *

* * * * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions, *including extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions),* significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

[(iii) alternatives to the proposed action,]

(iii) alternatives to the proposed action that achieve the same or similar public purposes, including alternatives that avoid the adverse environmental effects described in clause (ii) and alternatives that otherwise mitigate those adverse environmental effects,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term producitivity, [and]

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented, *and*

(vi) measures that will be taken to mitigate adverse environmental effects if the proposed action is implemented, including the reasons for selecting such measures,

(vii) a description of how the proposed action or chosen alternative and selected mitigation measures conform to the policies of this Act.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved *and the public.* Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes:

* * * * * * *

[(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;]

(F) recognize the global and long-range character of environmental problems and work vigorously to develop and implement policies, plans, and actions designed to support national and international effort to enhance the quality of the global environment;

* * * * * * *

TITLE II—COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. *(a)* The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and forseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities

(including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

(b) Not later than January 31 of each year, the President shall transmit to the Congress a report which—

(1) describes the President's strategy for implementing the policy and objectives set forth in section 101 during that year;

(2) describes areas of new or heightened environmental concern;

(3) describes initiatives to strengthen and improve Federal environmental programs;

(4) recommends priorities for national and international actions to protect the environment;

(5) analyzes problems associated with the implementation of this Act and the effectiveness of measures specified in detailed statements of Federal agencies under section 102(2)(C) to mitigate the adverse environmental impacts of Federal actions; and

(6) summarizes implementation of section 102(2)(C) during the previous year.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). [The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member] *The Chairman of the Council shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The Chairman* shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment. *All authority for exercising the powers, functions, and duties of the Council under this Act shall be vested in the Chairman.*

* * * * * * *

Sec. 204. * * *

* * * * * * *

(7) to report at least once each year to the President on the state and condition of the environment; [and]

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request; *and*

(9) to promulgate regulations concerning implementation of the National Environmental Policy Act by all Federal agenices

(including Federal independent regulatory commissions). Such regulations shall assure compliance with the statutory requirement for full consideration of the environmental impacts of proposed major Federal agency actions on geographic, oceanographic, and atmospheric areas within as well as beyond the jurisdiction of the United States and its territories and possessions, including the cumulative impacts of proposed Federal actions on global climate change, depletion of the ozone layer, transboundary pollution, loss of biological diversity, and other international environmental impacts.

ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

* * * * * * *

AUTHORIZATION

SEC. 205. There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following fiscal years which sums are in addition to those contained in Public Law 91-190:

(a) * * *

* * * * * * *

(e) $1,000,000 for each of the fiscal years 1989, and 1990, and $3,000,000 for each of the fiscal years 1991 and 1992.

○